UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES - SAN FRANCISCO

NATIONAL DANCE INSTITUTE –
NEW MEXICO, INC.

and **Case 28-CA-157050**

DIANA M. OROZCO-GARRETT, an Individual

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION[1]

National Dance Institute - New Mexico, Inc. (Respondent) violated the National Labor Relations Act (Act) by: (1) promulgating an overly broad and discriminatory rule prohibiting its employees from discussing with coworkers work issues and from protesting workplace actions arising from Respondent's management; (2) threatening its employees with unspecified reprisals if they violated the overly-broad and discriminatory rule; (3) maintaining an overly-broad and discriminatory rule in its employee handbook; (4) failing to assign its employee Diana M. Orozco-Garrett (Orozco-Garrett) dance classes; and (5) terminating Orozco-Garrett.

Well before the incidents that led to Respondent's discriminatory actions, Orozco-Garrett was a fourteen-year employee of Respondent, working as a passionate and dedicated part-time dance instructor at Respondent's facility in Santa Fe, New Mexico.

[1]General Counsel's Exhibits are referred to as (GC Exh.__); Respondent's Exhibits are referred to as (R. Exh. __); and Transcript citations are referred to by page number and line number as (Tr.__:__), unless the Transcript cite covers multiple pages.

Following the 2013-2014 academic year, Respondent placed Orozco-Garrett on probation, predicated on allegations whose veracity were never established.[2] The disputed probation led Orozco-Garrett to file her first unfair labor practice charge against Respondent on September 17, 2014, National Labor Relations Board (NLRB) Case 28-CA-136974.[3] The Complaint and its amendments, which the Region subsequently issued, eventually settled, and Respondent was required to rescind and remove violative language from Orozco-Garrett's probation discipline.[4]

Throughout this process, the incidents leading to Orozco-Garrett's discharge developed. Because Orozco-Garrett was so outspoken in exercising her rights under the Act, Respondent engaged in a campaign to discredit, undermine, and document Orozco-Garrett during the months it negotiated a settlement in Case 28-CA-136974, and in the months thereafter. Respondent pretextually based Orozco-Garrett's discharge with shifting allegations, claiming violations of Respondent's Core Values, Employee Conduct, and Office and Personal Etiquette Policies. This piling on of offenses supported Respondent's theory that Orozco-Garrett had violated the terms of her probation and ostensibly justified her discharge.

Based on the foregoing, Counsel for the General Counsel (CGC) respectfully requests the Administrative Law Judge (ALJ) find that Respondent committed the alleged unfair labor practices and recommend to the Board an appropriate remedy, including a cease and desist order, notice to employees, rescission of the overly broad and discriminatory employee conduct rules, rescission of Orozco-Garrett's discharge, and backpay to her for the period of time she would have remained employed.

[2] R Exh. H; Tr. 221-222; Tr. 627:7-628:4.
[3] GC Exh. 34.
[4] R Exh. G, pp. 2-3.

II. BACKGROUND

A. Respondent's Facility and Operations

Respondent operates a non-profit, kinesthetic dance instruction facility in Santa Fe, New Mexico. Respondent offers various programs, among which are the Outreach Program, including the Advanced Training and Residency components of the program, and SWAT/Cel teams.[5] These dance programs were the primary work assignments that Orozco-Garrett was assigned during her fourteen years of employment, in which her supervisors and/or managers were Executive Director Russell Baker, Artistic Director Liz Salganek, and Santa Fe Outreach Director Emily Lowan.[6]

The Outreach Program is geared towards underserved children in urban, rural and Native American communities throughout New Mexico, including Santa Fe, and targets public elementary schools serving families living in poverty with little or no access to funds with which to provide additional programs. The Program is a 30-week curriculum that commences in the middle of August and ends the following May.[7]

Students who enroll in the Outreach Program participate at their schools during or after school hours, or on weekends at Respondent's Dance Barns facility. Respondent's dance teachers (like Orozco-Garrett) travel to the schools once per week and teach fifty-minute classes. These classes prepare students for Respondent's signature, mass end-of-program performances at Respondent's Dance Barns facility.[8]

The end-of-program performances are held the final two weeks of the program, bringing together students from third grade to ninth grade - approximately 500 students en

[5] Tr. 26-31.
[6] On the record, Respondent admitted to the Section 2(11) supervisory status and Section 2(13) agent status of Baker, Salganek, and Lowman. (Tr. 281:5).
[7] Tr. 30-31.
[8] Tr. 28; Tr. 43.

masse – from 10 different Santa Fe schools.[9] These performances are composed of two casts, each of whom performs in seven hour-long performances on stage over a three-day period.[10] The students in the cast for Week One were different from the students in the cast for Week Two.[11]

More significantly, 15-20 adults are responsible for supervising the nearly 500 students who participate in these end-of-program performances. These performances include costumes, lights, and live music, through which the supervising adults have to navigate, while attempting to maintain safety and order in guiding the students.[12]

III. FACTUAL SUMMARY

A. Orozco-Garrett's Concerted Activities From February 11, 2015 Through May 2015

In preparation for its end-of-program performances, Respondent conducted its monthly artistic meeting on February 11, 2015.[13] Orozco-Garrett had been a consistent vocal contributor at monthly meetings[14] and, at the February meeting, voiced and described concerns she had with her supervisors' artistic choice to exclude the name of any Hispanic author from the script.[15] Respondent reacted to Orozco-Garrett's concerns with hostility over her disagreement with Respondent's artistic choice by opting to "keep the script as is."[16]

Respondent's dismissive behavior towards Orozco-Garrett's critique occurred one month before signing the settlement agreement in Orozco-Garrett's previous NLRB charge, Case 28-CA-13697, which ordered Respondent to rescind its overly broad employee conduct

[9] Additionally 20 Kindergarten students participate in the end-of-program performances.
[10] Tr. 20; Tr. 43; Tr. 55.
[11] Tr. 47:8-20; Tr. 477:12-13.
[12] Tr. 43; Tr. 54.
[13] All dates refer to Year 2015, unless noted otherwise.
[14] Tr. 366:22-367:6; 463:4-6; 464:3-465:9; 466:10-467:10.
[15] Tr. 463:21-465:9; GC Exhs. 39, 40, and 41; R Exh. PP.
[16] GC Exh. 28, p12 and GC Exh. 41.

rule and remove reference of that rule from the probation Respondent had issued to Orozco-Garrett on September 10, 2014.

Orozco-Garrett's critiques of Respondent continued throughout the preparation period for the May 2015 year-end event and thereafter, including her attempts to: (1) schedule more stage time for her students; (2) exclude a traditional Mexican ranchero song and a traditional exclamation from Spain in a dance skit describing New Mexican folklore; (3) advocate for the inclusion of Spanish-speaking students from one of Santa Fe's primarily Spanish-speaking public schools; and (4) rectify the communication problem that Spanish-speaking families have with Respondent.[17] In each of these examples, Orozco-Garrett shared her concerns with other employees, by voicing them at monthly meetings or more individually through text communications or informal conversations at the theater. In addition, in each of Orozco-Garrett's communications with Respondent about these issues she was speaking on behalf of other employees, as well as on her own behalf, whether that fact is directly evident because other employees had expressed similar concerns to Orozco-Garrett or indirect because the concerns Orozco-Garrett expressed were aimed at improving employee interactions with and cooperation with management in making the end-of-year performances a success and improving employees working conditions viz-a-viz management overall.

B. Orozco-Garret's Responsibilities at the 2015 End-of-Program Performances & Orozco-Garret's Purported Misconduct

Respondent assigned Orozco-Garrett to serve as a Runner for 115 fourth-grade students from El Camino Real Academy during Respondent's 2015 end-of-program performances. The job duties of a Runner are to work with students from a particular school

[17] GC Exh. 28, pp 11-12; Tr. 324:3-22; 366:22-367:6; 374:22-377; 394:4-9; 461-474.

at the end-of-program event, by helping to monitor the student performers during the event and getting them to and from the stage at the right time.[18]

Additionally, Artistic Director Salganek assigned Orozco-Garrett the hectic job of managing traffic during the runs and jumps dance for both the rehearsals and the performances.[19] Orozco-Garrett was to help performers transition smoothly from upstage to downstage and closer to the audience.[20]

To effectively perform that job, Orozco-Garrett was situated backstage, specifically standing offstage right in one spot, approximately 10-12 feet from an 'X' in the center of the stage that the performers ran to jump over. When the performers, running "full force," jumped over the 'X,' they continued running to the other edge of the stage. Orozco-Garrett's responsibility was to direct the line of running students to go around her and the curtain, and then back onto the stage to continue the next piece of the dance. Simultaneously, Orozco-Garrett had to protect a line of five year old "tiny tots" that were positioned against the wall in the dark.

Two of the students who participated in the May 2015 end-of-program performances were visually-impaired. Outreach Director Lowman, who was in charge of the May 2015 end-of-program performances and was the teacher at the Gonzales Community School where these students attended, never informed supervisors Baker and Salganek, or Respondent's dance teachers (including Orozco-Garrett), that these visually-impaired students would participate in the year-end event.[21]

[18] Tr. 318:7-15.
[19] Tr. 477:14-16; Tr. 478:14-479:5.
[20] Tr. 318:20-319:15; 476:11-21; 479:8-480:1.
[21] Tr. 98:7-9; 301:19-22; 386:19-21.

Furthermore, one of the visually-impaired students was being assisted with the help of the student's Educational Assistant, Laura Robledo. Respondent never informed Orozco-Garrett of that information, either.[22]

On about May 15, Orozco-Garrett was accused of allegedly grabbing a visually-impaired student and Robledo during the performance the previous night.[23] None of Respondent's staff members witnessed the alleged incident,[24] nor did any parent or student complain about it.[25] When Orozco-Garrett spoke with Robledo about the accusation, Robledo denied that a student had been injured.

More importantly, Respondent failed to present Robledo at trial to substantiate her claim that Orozco-Garrett grabbed her. Orozco-Garrett neither grabbed Robledo nor the visually-impaired student.[26] Furthermore, Orozco-Garrett was physically unable to grab either individual. At the time of the reputed incident, Orozco-Garrett was suffering from such a severe case of elbow tendonitis in her left arm - which required her to wear a black bandage - that she could not even pick up a coffee cup.[27] Additionally, Robledo was four inches taller and 50 pounds heavier than the diminutive Orozco-Garrett.[28]

Orozco-Garrett responded to Executive Director Baker's May 27, request to meet with her regarding the Gonzales incident with an e-mail on May 28, in which she stated her willingness to meet with Baker with the condition that he provide her with "full disclosure" of

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[22] Tr. 303:21-23; Tr. 400:25-401:2; Tr. 489:3-6.
[23] Tr. 298:8-304:5; 396:5-22; 713:6-15; R Exh. K.
[24] Tr. 303:24-25; 397:20-21.
[25] Respondent and Orozco-Garrett disagree as to Robledo's primary language being Spanish, which could have been a source of misunderstanding between Respondent and Robledo. (See GC Exh. 28, p 5, paragraph 3 and Tr. 499:7-10 for Orozco-Garrett's statement that Robledo's primary language is Spanish and that Spanish was the language in which Robledo communicated to her). Orozco-Garrett is fluent in Spanish, while Salganek neither speaks nor understands Spanish. GC Exh. 14, p 5, paragraph 1; Tr. 499:5-10; 502:5-7; Tr. 538:13-14.
[26] Tr. 480:21-22; 481:14-482:9.
[27] Tr. 482:19-483:19.
[28] Tr. 727-728.

the allegations against her and the facts on which they were based, so that she could protect herself against the railroading Orozco-Garrett believed had occurred in the investigation leading to her probation for the 2014-2015 academic year. Additionally, Orozco-Garrett requested that Director of Business and Administration Maria Wolfe not be present unless Orozco-Garrett is allowed the presence of her husband, a retired attorney, to safeguard her interests.[29] When Baker denied these requests, Orozco-Garrett e-mailed Baker on June 2, 2015, renewing the same requests and alluded to complaints against coworker Gemtria St. Clair during the same week of the end-of-year performances.[30]

Despite the serious allegations leveled against Orozco-Garrett and its refusals to meet with Orozco-Garrett (under the safeguards she requested), Respondent allowed Orozco-Garrett to continue teaching, with no additional supervision, students from the same age-group as the student whose injury, along with her educational assistant's injury, Orozco-Garrett was then under investigation for. These classes were in Respondent's three-week Summer Program at its Dance Barns facility.[31]

After the Summer Program ended, Orozco-Garrett taught another group of children, again without any additional supervision, of similar age to the visually-impaired student in the Gonzales incident which was still under investigation. The dance program lasted one week and held was in Artesia, New Mexico, approximately four hours from Respondent's facility.[32]

C. Orozco-Garrett's Concerted Activities From End of May 2015 Through September 2 & Respondent's Animosity Towards These Activities

To the displeasure of Respondent, Orozco-Garrett continued to exercise her federal right to discuss terms and conditions of employment with her coworkers. About June 18,

[29] Tr. 110-113; GC Exh. 11.
[30] GC Exh. 12; Tr. 111:17-23.
[31] Tr: 153:13-14; 497:7-498:4.
[32] Tr. 143-145; 522.

Director Lowman e-mailed employees about the dirty cantina sink and the effort Lowman undertook to clean it.[33] Orozco-Garrett approached coworkers Rachel Carpenter and Melissa Briggs, at different times in one day, to talk about the e-mail. Reputedly, Orozco-Garrett used foul language while discussing the e-mail with Carpenter and Briggs. No constituent, parent or student ever complained about Orozco-Garrett's comments. Nevertheless, Carpenter went to management and conveyed her subjective impression that parents were looking at her while Orozco-Garrett engaged in concerted activities. Nonetheless, Respondent seized on Carpenter's ill-founded complaint and Salganek sent Orozco-Garrett an e-mail implicating her for the alleged comments and warning her that Respondent wound consider her comments insubordinate if found similar to a comment Orozco-Garrett made *sotto voce* during the February monthly staff meeting- that teachers already had a voodoo doll of Lowman after Lowman, referring to a late change that she was advocating for the 2015 end-of-program event, deprecatingly asked the group, "You aren't going to make a voodoo doll of me, are you?"[34]

Salganek's e-mail to Orozco-Garrett, on July 31, stated that her conduct regarding Lowman's e-mail was insubordinate and contrary to the rule Respondent had to rescind, pursuant to the settlement agreement in Orozco-Garrett's prior NLRB charge. Salganek referred to Orozco-Garrett's disciplinary probation and closed the e-mail by stating that she was copying Director Baker and would be discussing possible disciplinary action against Orozco-Garrett for her comments about Lowman and her response to Salganek's July 13 e-mail request.[35]

[33] R Exh. II.
[34] Tr. 292:12-25; 293:15-24; 294:20-296:23; 688:15-21; 692:11-695; GC Exh. 4 and 15.
[35] R Exh U.

Nearly one month after Salganek's July 31 e-mail, Director Baker e-mailed Orozco-Garrett, admonishing her that any profanity she was alleged to have used within earshot of children or parents would be a violation of Respondent's employee conduct policy and requesting to meet with her to discuss the topic of Respondent's second investigation of her. Orozco-Garrett responded to Baker the following day with an e-mail and attached legal response in which she cites four counts against Respondent, ranging from maintaining an overly broad employee conduct rule to threatening her with unspecified reprisals and failure to assign her Fall 2015 classes.[36]

D. Respondent Fails to Assign Orozco-Garrett Classes for Fall 2015 Program & Terminates Her

Respondent never directly informed Garrett that she would not be assigned Fall classes, but because these assignments normally were discussed in mid-August and Orozco-Garrett had not heard anything from Respondent about her assignments for the 2015-2016 school year, she took it upon herself to contact Respondent. On August 25, Orozco-Garrett e-mailed Director Lowman to inquire about her Fall 2015 class schedule. Rather than respond to Orozco-Garrett's e-mail, Lowman forwarded it to Director Baker and proceeded to state that (1) she did not consider the expectations of Orozco-Garrett's probationary period to have been met, (2) Orozco-Garrett had refused to meet with Respondent regarding her probation without a lawyer present, had never admitted to any wrong doing, and (3) that she felt uncomfortable continuing to work with Orozco-Garret if the situation remained unchanged.

Moreover, Lowman wrote that it was difficult working as Orozco-Garrett's supervisor because Orozco-Garrett spoke ill of Lowman as a supervisor. Lowman ended her tirade by

[36] R Exh. F, p 4; GC Exhs. 21 and 22.

dredging up an undefined concern about Orozco-Garrett's work with schools, the SWAT dance team, and the upcoming 2016 end-of-program performance event.[37]

On September 2, Orozco-Garrett sent Director Baker a final e-mail and attachment, in which she described examples of Respondent's shifting allegations against her, what she believed to be disparate treatment, and Respondent's tolerance of similar behavior by others as that of which she was accused.[38]

On September 4, Respondent, via e-mail from Director Baker, terminated Orozco-Garrett, indicating in her termination letter that Baker had concluded, from his investigations of both the Gonzales incident and the incident regarding Orozco-Garrett allegedly using profanity in comments to co-workers about Director Lowman's group e-mail about the dirty cantina sink, that Orozco-Garrett had violated Respondent's Core Values, Employee Conduct, and Office and Personal Etiquette policies.

Gemtria St. Clair, who had also been investigated for the most serious of the infractions Orozco-Garrett was accused of, the physical grabbing or mishandling of a teacher/adult working in the end-of-year performances, was not terminated. The most glaring difference in Respondent's investigations of St. Clair and Orozco-Garrett is that Respondent met with St.Clair, whereas Respondent refused to meet with Orozco-Garrett despite her request to do so with her attorney. In addition, Director Baker admitted under oath that Orozco-Garrett's conduct violated Respondent's overly-broad and discriminatory rules, both the rule in Director Salganek's July 31 e-mail and Respondent's new *Expectations for Employee Conduct*.[39]

[37] R Exhs. Z, AA and LL; Tr. 40:18-25; 349:17-350:5; 434:7-19; 438:12-21; 529:10-18; 642:24-25.
[38] GC Exh. 25.
[39] Tr. 173:23-174:3.

Respondent's hostility towards Orozco-Garrett's concerted activities and her filing of the charge in Case 28-CA-136974 is manifested by the fact that: (1) the record is void of any evidence of Respondent's employees ever having been discharged for any offense remotely similar to those Orozco-Garrett was alleged to have committed; and (2) the record is void of any evidence of Respondent's employees being discharged for violating a probationary period. Rather, the record demonstrates that Respondent provided counseling to employees to improve their behavior and keep their jobs.[40] However, Respondent did not offer that opportunity to Orozco-Garrett.

On September 8, pursuant to Respondent's handbook, Orozco-Garrett timely filed with Respondent's Board a formal appeal of her discharge (and a complaint against Executive Director Baker). On September 30, Respondent's counsel e-mailed Orozco-Garrett, informing her that the Board would not consider her appeal because Respondent's new handbook, which was distributed the day before Orozco-Garrett's termination, applied only to current employees.[41]

I. Respondent Promulgated and Maintains its Overly-Broad and Discriminatory *Expectations for Employee Conduct* Rule.

The overly-broad and discriminatory portion of Respondent's *Expectations for Employee Conduct*, a work place conduct rule on page 10 of the Employee Handbook which was issued to Employees on September 3, 2015, is cited below. This rule, as part of the Employee Handbook, applies to all employees. Incredulously, while Respondent expects all employees to abide by this rule, Director Baker testified on the record that Respondent does not have any document that explains to employees the meaning of the words used to describe

[40] Tr. 700-703.
[41] GC Exhs. 28 and 30.

the conduct which is proscribed by it.[42] How and why *Expectations for Employee* rule violates Section 8(a)(1) of the Act is analyzed in detail in the Analysis section of this brief.

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Expectations for Employee Conduct

> Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.

IV. ANALYSIS

A. When in Conflict with that of Respondent's Witnesses, the ALJ Should Credit the Testimony of the General Counsel's Witness

In determining whether Respondent engaged in unfair labor practices as alleged in the Complaint, the ALJ is required to make certain credibility determinations. In the instant case, credibility determinations should be resolved in favor of the General Counsel's witness. In many instances, the ALJ's credibility determination will decide whether or not a violation of the Act has in fact taken place. Significant weight is given to an ALJ's credibility determination because the ALJ actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the ALJ that the witness is testifying truthfully or falsely. Credibility determinations may furthermore be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Medeco Security Locks,* 322 NLRB 664 (1996); *Shen Automotive Dealership Group,* 321

[42] Tr. 181:10-25.

NLRB 586, 589 (1996). Accord *V&W Castings.* 231 NLRB 912, 913 (1977), enfd. 387 F.2d 1006 (9th Cir. 1978).

When in conflict with that of Respondent's witnesses, the ALJ should credit the testimony of the General Counsel's witness, Orozco-Garrett, who testified in a manner that was inherently probable and uniformly consistent. By contrast, Respondent's witnesses, particularly Russell Baker, Liz Salganek, and Emily Lowman, were less than forthcoming during CGC's 611(c) examination and their answers were evasive. Respondent's witnesses simply denied knowledge and shirked any responsibility as to whether anyone had communicated to Orozco-Garrett that blind students and their educational assistants were participating in the end-of-year performances and who they were. Similarly, Respondent's witnesses denied knowledge of any parents or students actually having heard and understood comments that Orozco-Garrett made about Director Lowman or her e-mail about the cantina sink.

The answers Respondent's witnesses provided concerning Respondent's investigations of Orozco-Garrett(without ever meeting with her face-to-face and refusing to meet with her and her attorney, despite her being under threat of termination from her probation letter) and the evident impact on those investigations of Respondent's failure to meet with her, were vague, confusing and distorted. Witnesses Baker, Salganek and Lowman were reticent and guarded during questioning, even at times when it was reasonable to expect them to be frank and forthcoming. Even some of the facts alleged by Respondent differed in significant ways from those presented by General Counsel's witness.

For example, Director Baker's testimony about his investigations of both the Gonzales incident and the incident in which Orozco-Garrett was accused of using profanity within

earshot of parents and students was spotty.[43] Baker, as well as Salganek and Lowman, admitted to not knowing crucial facts such as the age of the visually-impaired student's Educational Assistant, when Respondent learned that visually-impaired students and their assistants would be participating in the end-of year performances, what Respondent did with that information in regard to safety for the end-of-year performances, and whether Respondent had ever even communicated that information to Orozco-Garrett and other employees.[44] Again, Baker, Lowman, and Salganek, testified nonchalantly and calculatedly about Orozco-Garrett's probation and that she, unlike any other comparator, was under threat of termination if she violated any of Respondent's rules or policies.[45] Baker also testified to what amounts to ignoring Orozco-Garrett's almost formal legal allegations and her request to meet with Baker along with her attorney.[46]

B. The Governing Law

An employer violates Section 8(a)(1) of the Act when it takes an adverse employment action against an employee that is motivated by the employee's protected concerted activity. *Lou's Transport*, 361 NLRB No. 158, slip op. at 2 (2014); *CGLM, Inc.*, 350 NLRB 974, 980 (2007). To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). The two concepts are analytically distinct. *Id.*

While the Act protects discussions between two or more employees concerning their terms and conditions of employment, the Board has found that activity is concerted where the

[43] Tr. 93-111; 114: 10-25; 127-128; 138; 140-142; 150; 160-163; 173-174; 177-179; 186-196.
[44] See *supra* note 43; Tr. 300-303; 400-402.
[45] Tr. 127-128; 250; 252; 312; 365-366; 437-438.
[46] Tr. 121-125; 133-135.

evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of concerns expressed by a group. *Amelio's,* 301 NLRB 182 (1991). In certain situations, the Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980).

Moreover, concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra, at 4. An employee's subjective motivation for taking action is not relevant to whether that action was concerted. *Id.* Indeed, as noted by the Board, employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. *Id.* citing *Circle K Corp.,* 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). Solicited employees do not have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. *Id.* at 6, citing *Mushroom Transportation,* 330 F.2d 683, 685 (3d Cir. 1964), *Circle K Corp.,* 305 NLRB at 933; *Whittaker Corp.,* 289 NLRB 933, 934 (1988); and *El Gran Combo,* 284 NLRB 1115, 1117 (1987).

Meanwhile, the concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. Id. citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). And while personal vindication may be among the soliciting employee's goals, that does not signify that the employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of her fellow employees. *St. Rose Dominican Hospitals,* 360 NLRB No. 126, slip op. at 4 (2014).

A violation of Section 8(a)(1) is established (1) where the concerted activity is

protected under the Act; (2) the employer knew of the concerted nature of the activity; (3) and the adverse employment action was motivated by the employee's protected concerted activity. *Meyers I*, 268 NLRB at 497. Where the issue turns on employer motivation, the shifting burden analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is applicable. *General Motors Corp.*, 347 NLRB No. 67, slip op. fn.3 (2006).

Evidence that may establish a discriminatory motive - *i.e.*, that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee –includes: (1) statements of animus directed to the employee or about the employee's protected activities (See, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (See, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (See, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (See, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000),

enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, *e.g.*, disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (See, e.g., *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014); *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, fn.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

C. Respondent, in its Employee Handbook, Promulgated and Maintains an Overly Broad and Discriminatory Rule Prohibiting Employees from Communicating Disagreement with or Protesting the Workplace Actions of Their Supervisors or Managers, in Violation of Section 8(a)(1).

Respondent promulgated and maintains its *Expectations for Employee Conduct*

work place conduct rule on page 10 in its Employee Handbook,[47] which was issued to Employees on September 3, 2015. The portion cited below is overly broad and discriminatory, in violation of Section 8(a)(1) of the Act.

***

Expectations for Employee Conduct

> Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.

Memorandum GC 15-04, issued by the General Counsel on March 18, 2015, explains the problem of the chilling effect that work place rules that restrict employees' interactions with management can have on employees' exercise of their rights under Section 7 of the Act.

> Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. The most obvious way a rule would violate Section 8(a)(1) is by explicitly restricting protected concerted activity; by banning union activity, for example. Even if a rule does not explicitly prohibit Section 7 activity, however, it will still be found unlawful if 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights.
>
> In our experience, the vast majority of violations are found under the first prong of the *Lutheran Heritage* test. The Board has issued a number of decisions interpreting whether "employees would reasonably construe" employer rules to prohibit Section 7 activity, finding various rules to be unlawful under that standard.

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In regard to lawful rules regulating employee conduct towards the employer, the GC includes a paragraph explaining that in determining the lawfulness of a rule, it is not read in isolation, but rather in the context of the severity of conduct that is prohibited by the rule.[48]

[47] GC Exh. 37, p 10.
[48] Memorandum GC 15-04, pp 8-9 (March 18, 2015).

Specifically, the GC cites a rule that contains phrases that prohibit being disrespectful to management and which would tend to unlawfully chill Section 7 criticism of an employer. However, GC reasons, that when viewed in the context of the entire provision, it becomes clear that the rule is focused on prohibiting serious misconduct such as threats and assault or insubordination of like tenor.

Respondent completely missed the point when it promulgated its work place conduct rule, cited word for word above. It is true that Respondent's rule is only missing the word "assaulting" which appears in the rule discussed as lawful in GC Memorandum 15-04. However, it is that very word, which has a decisively criminal, or at least tortious, connotation that would save the rule by indicating to a reasonable reader that what is intended to be prohibited is serious misconduct, not merely disagreeing with or disobeying management, as the words "insubordinate" or "threatening" could reasonably be read without the added context of the word "assaulting."

Furthermore, because the placement of the word "assaulting" in the example in Memorandum GC 15-04 bookends the list of proscribed behavior it avoids the disjunctive problem described by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB at 647 n.9, referring to a rule prohibiting "false, vicious, profane, or malicious statements," such that false statements were unlawfully prohibited even if they were not malicious. Similarly, Respondent's rule prohibits being "insubordinate, threatening, intimidating or disrespectful," such that being disrespectful is unlawfully prohibited even if it is not criminally or tortiously threatening.

Therefore, the ALJ should find that Respondent promulgated and maintained in its Employee Handbook the overly broad and discriminatory rule *Expectations for Employee Conduct*, as alleged.

D. Respondent Promulgated and Enforced an Overly Broad and Discriminatory Rule Prohibiting Employees from Discussing Work Issues with Fellow Employees and Communicating Disagreement with or Protesting the Workplace Actions of Their Supervisors or Managers, in Violation of Section 8(a)(1).

On July 31, Respondent e-mailed Orozco-Garrett[49] it considered her conduct in communicating disagreement with and protesting Director Lowman's decision to send a group e-mail regarding the dirty cantina sink insubordinate and in violation of Respondent's defunct and rescinded Standards of Professional Conduct.

The well-settled test for violations of Section 8(a)(1), where protected activity is implicated, is whether "under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees." See *Medeco Sec. Locks, Inc. v. NLRB,* 142 F.3d 733, 745 (1988) (citing to *NLRB v. Grand Canyon Mining Co.,* 116 F.3d 1039, 1044 (4th Cir.1997); *see also Equitable Gas Co. v. NLRB,* 966 F.2d 861, 866 (4th Cir.1992).[50] Similarly, it is also settled that the Board may find a rule violates Section 8(a)(1) of the Act if the rule could reasonably be construed by employees to prohibit protected activity, whether or not the rule is actually enforced. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).[51]

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[49] (R Exh. U).

[50] The test under § 8(a)(1) "is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate." *N.L.R.B. v. Nueva Engineering Inc.,* 761 F.2d 961, 965 (4th Cir.1985).

[51] "In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); See *NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992).

Orozco-Garrett's comments about Lowman's group e-mail and Lowman's decision to send it, another example of Orozco-Garrett criticizing Respondent's workplace decisions, may not be a perfect fit for prototypical protected concerted activity; however, that fact does not diminish or eliminate their protection under the Act. It is well settled that protesting and discussing supervisory conduct is protected activity under Section 7 of the Act. *Millcraft Furniture Co*., 282 NLRB 593, 595 (1987); *Fair Mercantile Co., 271* NLRB 1159, 1162-1163 (1984); *Calvin D. Johnson Nursing Home*, 261 NLRB 289, 289 n.2 (1982).

Antiunion motivation is not required to find that a rule violates Section 8(a)(1).[52] However, Respondent's animus toward Orozco-Orozco-Garrett's protected concerted activity can clearly be inferred in the instant matter from the (1) the timing of Respondent's promulgation of the overly broad and discriminatory rule in Director Salganek's July 31 e-mail, in relation to Orozco-Orozco-Garrett's protected concerted activity; (2) its proscriptive character regarding discussing work issues with fellow employees and communicating disagreement with or protesting the workplace actions of their supervisors or managers; (3) Respondent's reference to Orozco-Orozco-Garrett's probation in the final paragraph of the e-mail, the violation of which, would lead to disciplinary action, up to termination; (4) Respondent's incomplete investigations of both the Gonzales incident and the manner in which Orozco-Garrett mocked Lowman's group e-mail regarding the dirty cantina sink, and its shifting allegations as to how Orozco-Garrett had actually violated Respondent's policies;[53] and (5) Respondent's prior unfair labor practices, including the promulgation of the

[52] *See Standard–Coosa–Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1138 & n. 6 (4th Cir.1982) (courts reviewing independent § 8(a)(1) violations decide if employer's actions are coercive and do not inquire into anti-union animus; this discriminatory intent is element of § 8(a)(3) alone).

[53] See *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014) (finding that persuasive evidence that Respondent's reasons for discharges of discriminatees was pretextual, including shifting explanations and failure to allow discriminatees the opportunity to respond to allegations of misconduct, further supported the Board's finding of animus).

overly broad and discriminatory rule it was required to rescind in the settlement of Orozco-Garrett's first Board charge.

Actions by Respondent that distinguish among employees because they engage in protected concerted activity are inherently destructive of rights under Section 7 of the Act in that the actions discourage employees from engaging in activities protected by Section 7 of the Act.[54] Respondent's promulgation of the overly broad and discriminatory rule in its July 31 e-mail to Orozco-Garrett and its resulting second investigation of Orozco-Orozco-Garrett, in regard to her violating that rule by the manner in which she communicated disagreement with and protested Director Lowman's decision to send a group e-mail regarding the dirty cantina sink, is inherently destructive of Section 7 rights in that it can be inferred that Respondent's conduct was motivated by the desire to discourage such disagreement and protest. One is held to intend the foreseeable consequences of one's actions.[55]

Therefore, the ALJ should find that the rule promulgated by Respondent in its July 31 e-mail is overly broad and discriminatory and prohibits employees from discussing work issues with fellow employees and from protesting workplace actions arising from Respondent management as alleged.

E. Respondent Threatened Employees with Unspecified Reprisals, including Discharge, in Violation of Section 8(a)(1).

Respondent threatened its employees with unspecified reprisals, including discharge, in Violation of Section 8(a)(1) by stating to Orozco-Garrett in Salganek's e-mail[56] on July 31 the proscriptions against violating any other policies, procedures or direction from senior management that were included in her probation. Furthermore, Salganek reminded Orozco-

[54] See *Contractor Servs., Inc.*, 324 NLRB 1254, 1258 (1977).
[55] See *Radio Officers v. NLRB*, 347 U.S. 17, 44-45 (1954)
[56] R Exh. U at p 2.

Garrett, in her e-mail, that the disciplinary action Orozco-Garrett could be subject to if found to have violated any of the proscriptions, included termination. Salganek's July 31 e-mail further stated that the e-mail was being forwarded to Executive Director Baker and that Salganek and Baker would be discussing possible disciplinary action against Orozco-Garrett based on her comments about Director Lowman and Orozco-Garrett's response to Salganek's July 13 request which Salganek considered defiant and insubordinate. In *Fair Mercantile Co.*,[57] employees complaints about supervision, "includ[ing] such matters as … hostility or rudeness in the way job assignments were made" were protected under the Act. Similarly, Orozco-Garrett's complaints and sarcastic comments about Director Lowman's group e-mail and that Lowman's statements in that e-mail were out of touch with reality or pathetic[58] were protected. In sum, when an employer threatens employees with discharge if they concertedly complain about wages, hours, or other terms and conditions of employment, an employer engages in unfair labor practices in violation of Section 8(a)(1) of the Act. 271 NLRB at 1162-1163.

Therefore, the ALJ should find that the rule promulgated by Respondent in its July 31 e-mail threatens employees with unspecified reprisals if they violate the rule, as alleged.

F. Respondent Terminated Orozco-Garrett and Failed to Assign Her Classes for the Fall Program, Because She Engaged in Concerted Activity, in Violation of Section 8(a)(1) of the Act.

1. Orozco-Garrett Engaged in Concerted Activities

In this case, it is clear that Orozco-Garrett engaged in concerted activities. On February 11, Orozco-Garrett voiced concerns about Respondent's exclusion of the names of

[57] 271 NLRB at 1162.
[58] Tr. 507:24; 681:24-682:4.

any Hispanic authors from the script for its end-of-year event.[59] It is axiomatic that a dance instructor's criticism of management's artistic choices for the end-of-year performances during a monthly preparation and choreography meeting of instructors and staff held for the purpose of preparing for those performances, are discussions of working conditions of all instructors and staff preparing for the performances. The ability to express a difference of opinion, especially in an artistic endeavor, implicates working conditions for those working on the endeavor. "It is settled that 'when the exercise of a function of management affects conditions of employment, the employees have a right to protest the particular action taken.'" *Enterprise Products, Inc*., 264 NLRB 946, 948 (1982) (citing *Hagopian & Sons, Inc.* v. *N.L.R.B*, 395 F.2d 947, 951 (6th Cir. 1968)).

Orozco-Garrett continued engaging in protected concerted activity throughout the preparation period for the May 2015 year-end event and thereafter, by attempting to: (1) schedule more stage time for her students; (2) exclude a traditional Mexican ranchero song and a traditional exclamation from Spain in a dance skit describing New Mexican folklore; (3) advocate for the inclusion of Spanish-speaking students from one of Santa Fe's primarily Spanish-speaking public schools; and (4) rectify the communication problem that Spanish-speaking families have with Respondent.

Finally, Orozco-Garrett spoke to coworkers Carpenter and Briggs about Director Lowman's June 18 e-mail regarding the dirty cantina sink.

2. Respondent Knew of Orozco-Garrett's Concerted Activities

Record evidence presented at trial proves there is no question that Respondent had knowledge of each of the examples described above. Co-employee Carpenter marched to

[59] See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 822-823 (1984).

Respondent and informed it about Orozco-Garrett discussing Lowman's e-mail to co-employees. Similarly, Orozco-Garrett, in front of her co-workers at the February 11 monthly meeting, expressed concerns about Respondent's exclusion of the names of any Hispanic authors from the script for its end-of-year event.

3. Respondent Failed to Assign Fall Program Classes, and Fired, Orozco-Garrett Because of Her Concerted Activities

The record establishes that Respondent was hostile towards Orozco-Garrett's concerted activities, and that it was willing to violate the law to eradicate this type of activity from the workplace. Moreover, Respondent's belated rationalizations for its decisions to fire this discriminatee cannot withstand careful scrutiny.

In this case, the record contains substantial evidence of animus against Orozco-Garrett's concerted activities, including, but not limited to, Artistic Director Salganek's July 31 e-mail that (1) prohibited employees from discussing work issues with coworkers and from protesting management's decisions and (2) threatened employees if they violated that rule. Also, Emily Lowman testified that, in recommending that Orozco-Garrett not pass her probation, she found it difficult working as Orozco-Garrett's supervisor because Orozco-Garrett spoke ill of Lowman as a supervisor. See *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998) (in a labor-relations context company complaints about a "bad attitude" are often euphemisms for prounion sentiments); *Boddy Const. Co.*, 338 NLRB 1083, 1083 (2003) (term "instigator" was a euphemism for employee's prounion sentiments);

Moreover, the record reflects Respondent disparately treated employees on how it meted out discipline for the same or similar infractions. Gemtria St. Clair committed the same infraction that Orozco-Garrett was alleged to have committed, during the 2015 end-of-program performances: grabbing a participant. Yet, St. Clair received a warning, while

Orozco-Garrett was denied teaching Fall Program classes and was subsequently discharged. Such blatantly disparate discipline is evidence of Respondent's unlawful motive. *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991) (blatant disparate treatment is sufficient to support a prima facie case of discrimination). Moreover, the fact that Respondent continued to assign dance classes to Orozco-Garrett after the alleged grabbing incident demonstrates that Respondent knew the allegations against Orozco-Garrett were baseless.

Additionally, Respondent's slipshod investigation of Orozco-Garrett's alleged misconduct evinces that Respondent's intent was not to assign Orozco-Garrett classes for the Fall Program and to fire this troublemaker. Respondent repeatedly refused to meet with Orozco-Garrett, after she requested to know the unfounded charges leveled against her and wanted her attorney present for the meeting. Instead of acquiescing to these minor requests that would have imposed no hardship on Respondent, Respondent denied Orozco-Garrett's pleas and never met with her to hear her version of the events in question. Respondent's failure to conduct a fair and complete investigation into the of allegations of misconduct suggests that Respondent was not genuinely interested in knowing the underlying facts and circumstances of the event but, rather, was looking for a pretext to fire Orozco-Garrett. See *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Burger King Corp.*, 279 NLRB 227, 239 (1986).

Respondent cannot rebut the General Counsel's prima facie case. As a result, the Administrative Law Judge (ALJ) should find that the failure to assign Orozco-Garrett classes for the Fall Program, and firing Orozco-Garrett, violated Section 8(a)(1), as alleged. See *Aero Metal Forms,* 310 NLRB 397, 399 fn.14 (1993) (where employer's purported reason for discharging employee is pretextual, it has failed to meet its affirmative burden under *Wright*

Line). Respondent simply presenting a legitimate reason for its actions is not enough to overcome the General Counsel's prima facie case. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 966 (2004); *T&J Trucking Co.*, 316 NLRB 771, 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

G. Respondent Failed to Assign Fall Program Classes to, and Terminated Orozco-Garrett Because She Violated Respondent's July 31 E-mail and the Employee Handbook Rule, in Violation of Section 8(a)(1) of the Act.

The Board has consistently stated that discipline imposed pursuant to an unlawfully overbroad rule violates the Act. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Opryland Hotel*, 323 NLRB 723 (1997); In *The Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4 (2011), based on an in-depth examination of the policy rationales underlying this precedent, the Board held that discipline imposed pursuant to an unlawfully overbroad rule only violates the Act where an employee violated the rule by: (1) engaging in protected conduct; or (2) engaging in conduct that implicates the concerns underlying Section 7 of the Act but is not protected by the Act because it is not concerted. Id., slip op. at 3-4. There is no violation of the Act where "the conduct for which the employee is disciplined is wholly distinct from activity that falls within the ambit of Section 7." Id., slip op. at 4. Additionally, an employer can avoid liability for discipline if it can establish that the employee's conduct actually interfered with his own work or that of others or with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. Id.

The record demonstrates that Orozco-Garrett regularly engaged in concerted activities with other employees for the purposes of mutual aid and protection by discussing Respondent's working conditions, including, but not limited to, criticizing artistic choices

made by management during staff meetings, from February through May, as well as by criticizing a supervisor's decision to send a group e-mail regarding a dirty cantina sink, and criticizing management workplace decisions from June through her termination in September. The record also demonstrates that Orozco-Garrett had a history of protected concerted activity, including the filing of her prior NLRB charge and a September 2014 EEOC complaint.[60]

The record is replete with examples of Respondent's knowledge of all of Orozco-Garrett's protected concerted activities and that Respondent disliked it, was agitated by it, and warned Orozco-Garrett on various occasions to stop, with direct statements disfavoring her activities and/or conduct, and specifying consequences of her continuing to engage in them which are consistent with the actions Respondent took against her. The record also shows that the timing of Respondent's actions against Orozco-Garrett is suspiciously close to the timing of Orozco-Garrett's protected concerted activity, that Respondent treated Orozco-Garrett disparately from other employees who Respondent had accused of the same or similar infractions, and that Respondent failed to properly investigate the infractions it had accused Orozco-Garrett of committing by not even meeting with Orozco-Garrett and offering Orozco-Garrett to meaningfully respond to Respondent's accusations against her.[61]

For all of these reasons, CGC argues and urges the ALJ to find, that Respondent's conduct towards Orozco-Garrett, up to and including, her termination was because Orozco-Garrett engaged in protected concerted activity and violated both the rule Respondent promulgated in its July 31 e-mail to Orozco-Garrett and the *Expectations for Employee Conduct* rule Respondent promulgated in its September Handbook.

[60] See *supra* notes 14-17, 33-36.
[61] See *supra* note 37-41, 60.

H. Respondent Failed to Assign Classes to and Discharged Orozco-Garrett Because She Filed the Charge in Case 28-CA-136974, in Violation of Section 8(a)(1) and (4) of the Act.

The Board goes out of its way to protect its processes and those who turn to the Board for help. See *General Services, Inc*., 229 NLRB 940, 941 (1977) ("if the Board is to perform its statutory function of remedying unfair labor practices its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings." To this end, "[t]he approach to Section 8(a)(4) generally has been a liberal one in order fully to effectuate the section's remedial purpose." Id. (quoting *NLRB v. Scrivener, d/b/a AA Electric Co*., 405 U.S. 117, 124 (1972)). Thus, it is beyond purview that Section 8(a)(4) protects employees who file and process charges with the Board. See, e.g., *Larry Blake's Restaurant*, 230 NLRB 27 (1977); *S.E. Nichols Marcy Corp*., 229 NLRB 75 (1977); *Portsmith Ambulance Serv*., 323 NLRB 311 (1997); *Florida Steel*, 214 NLRB 264 (1974). "The prohibition expressed in Section 8(a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes." *Filmation Associates, Inc.*, 227 NLRB 1721, 1721 (1977).

The record demonstrates that Orozco-Garrett filed the NLRB charge against Respondent in Case 28-CA-136974. The record further evinces that Respondent signed a Settlement Agreement, in order to avoid litigating that charge, and had to pay Orozco-Garrett wages owed to her, rescind unlawful language in her probationary letter, revise an overly-broad and discriminatory rule, and post the Notice to Employees.

The record amply demonstrates that, less than two months after executing the Settlement Agreement, Respondent ushered its crusade to eradicate Orozco-Garrett from the workplace. The baseless charges of grabbing a student (and the student's assistant) were filed against Orozco-Garrett, followed by Orozco-Garrett's alleged foul language while discussing with coworkers about a supervisor's e-mail. By the first week of September 2015, Respondent had eliminated Orozco-Garrett from teaching dance classes for the Fall Program and had fired her.

Unquestionably, it can be inferred that Respondent took these adverse actions against Orozco-Garrett, because Orozco-Garrett filed the NLRB charge in Case 28-CA-136974 or gave testimony under the Act. See, e.g., *Lucky Cab Company*, 360 NLRB No. 43, slip op. at 4 (2014); *ManorCare Health Services – Easton,* 356 NLRB No. 39, slip op. at 3 (2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997). Accordingly, the ALJ should find that Respondent violated Section 8(a)(4) of the Act.

I. Orozco-Garrett Should Be Made Whole, Including Through Payment for Search-For-Work and Work-Related Expenses, Regardless of Whether These Amounts Exceed Interim Earnings.

As specifically requested in the Complaint, in addition to being entitled to all traditional remedies for an unlawful discharge, Orozco-Garrett is entitled to be made whole for search-for-work and work-related expenses regardless of whether these amounts exceed any interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had

the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment, *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); the cost of tools or uniforms required by an interim employer, *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965); room and board when seeking employment and/or working away from home, *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976); contractually required union dues and/or initiation fees, if not previously required while working for respondent, *Rainbow Coaches*, 280 NLRB 166, 190 (1986); and/or the cost of moving if required to assume interim employment, *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See West Texas Utilities Company, Inc.*, 109 NLRB 936, 937 fn.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also North Slope Mechanical*, 286 NLRB 633, 641 fn.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim

earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses. *Midwestern Personnel Services*, 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Kentucky River Medical Center*, 356 NLRB No. 8 slip op. at 3 (2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners*, 361 NLRB No. 57 slip op. at 2 (2014) (quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991,

Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Tortillas Don Chavas*, 361 NLRB No. 10 slip op. at 3 (2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period. Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerboxer Plastic Co., Inc.*, 104 NLRB 514, 516 (1953). These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Kentucky River Medical Center*, 356 NLRB No. 8 slip op. at 1 (2010) (interest is to be compounded daily in backpay cases).

V. CONCLUSION

CGC respectfully submits that the foregoing reasons and the record evidence considered as a whole, establish that Respondent has violated Section 8(a)(1) of the Act, as alleged in the amended Complaint. Through its conduct, Respondent infringed upon the rights of its employees to engage in concerted activities without interference, restraint and coercion. Additionally, the record evidence established that Respondent would not have

failed to assign regular Fall program dance classes to and discharged Orozco-Garrett in the absence of her protected concerted activities or her having filed a charge with the Board and cooperated with a Board case investigation.

The ALJ is, therefore, urged to make appropriate findings of fact, conclusions of law, and such recommendations to the Board as will properly remedy Respondent's unfair labor practices, by requiring Respondent to: cease and desist from such unlawful conduct; post an appropriate Notice to Employees at Respondent's facility and by electronic means, a proposed copy of which is attached and make Orozco-Garrett whole, consistent with the Board's recent decision in *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Dated at Albuquerque, New Mexico, this 8th day of January 2016.

Respectfully submitted,

/s/ Cristobal A. Munoz

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF TO THE NATIONAL LABOR RELATIONS BOARD in *National Dance Institute - New Mexico, Inc.*, Case 28-CA-157050, was served by E-Gov, E-Filing, and E-Mail, on this 8th day of January 2016, on the following:

Via E-Gov, E-Filing
Honorable Gerald M. Etchingham
Associate Chief Administrative Law Judge
National Labor Relations Board
Administrative Law Judge Division
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via E-Mail
Patricia Salazar, Attorney at Law
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/s/ Cristobal A. Muñoz

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(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT promulgate, maintain or enforce a rule prohibiting you from communicating disagreement with or protesting the workplace actions of your supervisors or managers.

WE WILL NOT maintain the following overly-broad rule in our National Dance Institute New Mexico Employee Handbook:

> At page 10
>
> ##############
>
> **Expectations for Employee Conduct**
>
> Being insubordinate, threatening, intimidating or disrespectful to managers, supervisors, coworkers, or any other individual in the course of conducting business will result in discipline, up to and including termination.
>
> ################

WE WILL NOT threaten you with unspecified reprisals because you exercise your right to talk to other employees or concertedly discuss with others your working conditions, wages, or other terms and conditions of employment, including complaints about supervisors or managers.

WE WILL NOT discharge you or subject you to disciplinary investigations because you engaged in protected concerted activity or because you filed a charge with the National Labor Relations Board (Board) and cooperated with a Board case investigation.

WE WILL NOT fail to assign you dance classes because you engage in protected concerted activity or because you filed a charge with the Board and cooperated with a Board case investigation.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the Expectations for Employee Conduct rule in our employee handbook, and

WE WILL, to the extent we have not already done so, furnish all current employees with inserts for the current employee handbooks that (1) advise employees that the overly-broad Expectations for Employee Conduct rule has been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the overly-broad Expectations for Employee Conduct rule, or (2) provide the language of lawful rules and notify all employees who were issued the former National Dance Institute New

Mexico employee handbook containing the overly-broad Expectations for Employee Conduct rule that it has been rescinded and will no longer be enforced.

WE WILL pay **DIANA OROZCO-GARRETT** for the wages and other benefits she lost because we failed to assign her Fall dance classes and unlawfully discharged her.

WE WILL offer **DIANA OROZCO-GARRETT** immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL remove from our files all references to the discharge and the results of the disciplinary investigations underlying the discharge of **DIANA OROZCO-GARRETT** and **WE WILL** notify her in writing that this has been done and that the discharge and the results of the disciplinary investigations underlying her discharge will not be used against her in any way.

National Dance Institute New Mexico, Inc.

_____
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

2600 N CENTRAL AVE, STE 1400
PHOENIX, AZ 85004-3019

Telephone: (602)640-2160

Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.